

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7696

Petition of New Cingular Wireless PCS, LLC,)
d/b/a AT&T Mobility ("AT&T"), for authority to)
install a wireless communications facility in)
Coventry, Vermont)
)

Order entered: 2/11/2011

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") approves the petition filed by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T" or the "Petitioner"), pursuant to 30 V.S.A. § 248a, and the Board's Order implementing standards and procedures under this section ("Procedures Order")¹, and grants the Petitioners a certificate of public good ("CPG") authorizing the installation of telecommunications facilities located in the Town of Coventry, Vermont (the "Project"), as part of Petitioner's wireless telecommunications service upgrade.

II. BACKGROUND

This case involves a petition and prefiled testimony filed by the Petitioner on December 3, 2010, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the construction of the facilities identified above.² Pursuant to the Procedures Order, comments or requests for hearing on an application must be filed within 21 days of the date that the application was filed with the Board.³

1. *Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 14, 2009.

2. AT&T filed its prefiled testimony largely in the form of a "project narrative" that addresses the applicable § 248a criteria. We find that this approach is sufficient for this type of project given that § 248a allows for a simplified review process. However, the Board notes that this approach may not be sufficient for other projects seeking Board approval under § 248, and the Board may require prefiled testimony in traditional question and answer form for those projects.

3. Procedures Order at 9.

On December 27, 2010, Jared Margolis, Esq., filed a notice of appearance, a motion to intervene, and a motion for finding of significant issues, on behalf of Bruce Hamilton, a neighboring landowner to the parcel on which the Project is proposed to be located. Mr. Hamilton owns a 154-acre parcel adjacent to the proposed site and claims that the Project will be located 439 feet from his dwelling and will "significantly impact views" from the property. Mr. Hamilton argues that the Project, by altering the view from his property, "would reduce the value of his rental property as well as the development potential of his property."⁴ Mr Hamilton also contends that the Petitioner has not adequately addressed the aesthetic impacts of the Project.

On December 27, 2011, the Vermont Department of Public Service ("Department") filed a letter with the Board stating that it appears that the Project will have an adverse affect on aesthetics, but that it has not conducted an aesthetics review to determine whether the affect is undue. The Department also suggests that the Petitioner be requested to provide additional information regarding radio frequency radiation. Further, the Department states that the Project "meets the Board's standards other than aesthetics," and that the Project "will promote the general good of the State consistent with 30 V.S.A. § 202c(b)."⁵

On January 11, 2011, AT&T filed a memorandum in opposition to Mr. Hamilton's motions for intervention and for finding of significant issues.

On January 20, 2011, Mr. Hamilton filed a reply to AT&T's memorandum in opposition. No other comments regarding the Project have been filed with the Board.

The Board has determined that the petition and prefiled testimony have effectively addressed the applicable substantive criteria of 30 V.S.A. § 248a. Consequently, we find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and no hearings are required.

4. Hamilton Motion to Intervene at 2-3.

5. Department comments at 2.

III. PROCEDURAL AND PRELIMINARY ISSUES

Motion for Finding of Significant Issues and Request for Hearing

Pursuant to 30 V.S.A. § 248a and the Procedures Order, the Board must determine whether the application raises a significant issue. Mr Hamilton argues that the Project raises a significant issue with respect to aesthetics pursuant to 10 V.S.A. § 6086(a)(8). Mr. Hamilton contends that the aesthetic impacts of the Project are "troubling," and could be reduced by relocating the Project to an alternative location or using an alternative tower design.⁶ Mr. Hamilton argues that AT&T's aesthetic analysis is incomplete because AT&T has failed to provide a map showing all the areas from which the Project might be visible. Mr. Hamilton contends that there are reasonable mitigation measures, such as relocation of the Project to another site and use of a lattice type tower design, which AT&T has failed to take. Mr. Hamilton also argues that AT&T has provided insufficient information regarding the Project's compliance with written community standards.

AT&T contends that it has included as part of its petition "photographic simulations depicting the Project in its surroundings, as well as a map identifying locations on public roads from which the Project is anticipated to be visible based on a balloon test."⁷ AT&T also asserts that it has considered the alternative sites suggested by Mr. Hamilton, but declined to pursue these alternatives because they provided no discernable aesthetic improvement; therefore, "[a]bsent a compelling reason to abandon the Project, coupled with the considerable effort and resources AT&T . . . had expended in assessing the suitability of the Project on the property and negotiating a lease, AT&T declined to further pursue either of Mr. Hamilton's alternatives."⁸ In addition, AT&T contends that there is no evidence to suggest that use of a lattice type tower instead of a monopole tower would result in reducing the aesthetic impact of the Project.⁹ AT&T maintains that it has analyzed the effect of the Project on the relevant provisions in the

6. Hamilton Motion Re: Significant Issues at 1-2.

7. AT&T Response at 19.

8. AT&T Response at 6 and fn. 13.

9. AT&T Response at 21.

town and regional plans and has incorporated this analysis as part of its prefiled testimony. AT&T also argues that both the regional and town planning entities have endorsed the Project and that these recommendations are entitled to substantial deference pursuant to § 248a(c)(2).

We conclude that Mr. Hamilton has failed to show that the Project raises a significant issue with respect to aesthetics. The Board accepts Mr. Hamilton's contention that the Project will be visible from certain vantage points on his property and that the Project will have an impact on views from these areas. First, we note that the aesthetics criterion is primarily focused on impacts from public viewpoints, rather than views from private property.¹⁰ Even if we were to consider the aesthetic impact on Mr. Hamilton's private property, Mr. Hamilton has not explained why the Project will be out of context with its surroundings, he has not identified a community standard with which the Project would be considered inconsistent, nor has he explained why the Project would be considered shocking or offensive to the average viewer. Further, AT&T's decision not to employ the Project location and tower design preferred by Mr. Hamilton does not show that AT&T has not taken reasonable mitigation measures to reduce the aesthetic impact of the Project. Mr. Hamilton has failed to show that an alternative location or tower design would provide any discernable reduction in the aesthetic impact of the Project on the surrounding area. In addition, as noted in the findings set forth below, we find that AT&T has provided sufficient evidence in the form of prefiled testimony and exhibits to make a determination regarding the aesthetic impacts of the Project. Therefore, Mr. Hamilton has not shown that the Project raises a significant issue with respect to aesthetics and, consequently, his request for a hearing on this issue is denied.

Motion to Intervene

Mr. Hamilton requests to be granted intervention as of right, or, in the alternative to be granted permissive intervention in these proceedings. In support of his motion, Mr. Hamilton contends that the Project will "alter the current views" from his property and will, consequently, "reduce the current value of his rental property as well as the development potential of his

10. See *In re Rinkers, Inc.*, No. 302-12-08 Vtec. Slip op at 17-18 (Vt Env'tl. Ct., May 17, 2010) (Wright J.) (quoting *In re Lawrence E. Thomas*, No. 2W0544-EB, Findings of Fact, Conclusions of Law and Order at 11 (Vt, Env'tl. Bd. Feb 18, 1986).

property."¹¹ Mr Hamilton also argues that the Project will have an "impact on the character of the area" surrounding the Project.¹² Therefore, Mr. Hamilton argues that he has a substantial interest in the outcome of these proceedings and that this interest is not represented by any other party to these proceedings.

AT&T requests that the Board deny Mr. Hamilton's motion because he has failed to demonstrate a "substantial issue cognizable under Section 248a that warrants intervention in this proceeding."¹³ AT&T argues that "property values and future development plans of abutters are not recognized interests under any of the Section 248a criteria, nor the Act 250 criteria incorporated by reference under 30 V.S.A. § 248a(c)(1)."¹⁴ AT&T contends that 10 V.S.A. § 6086(a)(8) is intended to protect against aesthetic impacts on public areas and the "impact of a project upon an individual property owner's private views is . . . beyond consideration in a Criterion 8 aesthetics analysis." ¹⁵

As noted above, an individual property owner's private views are not the primary focus under 10 V.S.A. § 6086(a)(8). We also conclude that the principal concern expressed in Mr. Hamilton's request to intervene in this matter is related to private views from his own property. However, Mr. Hamilton has also professed an interest in protecting the aesthetics and character of the area in which he lives and where the Project is proposed to be located. Therefore, we grant Mr. Hamilton permissive intervention, pursuant to Board Rule 2.209(B), limited to the aesthetic impact of the Project on the surrounding area.

Department Letter

The Department's letter states that "it appears to the Department that the project will have an adverse affect on aesthetics."¹⁶ The Department also states that it has not conducted an

11. Hamilton Motion to Intervene at 2-3.

12. Hamilton Motion to Intervene at 3.

13. AT&T Response at 9-10

14. AT&T Response at 10-11.

15. AT&T Response at 12.

16. Department comments at 1.

aesthetics review of the project and that if the Board determines that more process is in order it will attempt to contract with an aesthetics expert. The Department states that due to the lower elevation of the Project site, the Project antenna height is close to that of Mr. Hamilton's residence which may cause the Project to exceed the Maximum Permissible Exposure ("MPE") at this location. Finally, the Department "concludes that the filing meets the Board's standards other than aesthetics" and "will promote the general good of the State consistent with subsection 202c(b) of this title."¹⁷

In response to the Department's concerns regarding Radio Frequency Radiation ("RFR") emissions, AT&T states that the level of emissions at Mr. Hamilton's residence "will be orders of magnitude lower than the 13% of the Federal Communications Commission ("FCC") threshold at the tower base." AT&T also states that it will send a letter to the parties confirming the emission level.¹⁸

We find the Department's letter confusing at best. On the one hand, the Department concludes that the Project will have an adverse impact on aesthetics. However, the Department acknowledges that it reached this conclusion without the benefit of any aesthetic analysis. The Department also raises concerns regarding RFR exposure at the Hamilton residence, but offers no explanation as to why the RFR study conducted by AT&T and included as part of its petition is insufficient in this regard. In addition, the Department states that, with the exception of aesthetics, the Project complies with all other Board standards which include standards related to RFR emissions. In any case, as noted in the findings below, we conclude that AT&T has provided sufficient information regarding aesthetic impacts and RFR emissions in order to make a determination on these issues and, therefore, no further action in response to the Department's letter is necessary.

17. Department comments at 2.

18. AT&T has not yet filed this letter with the Board or other parties. Therefore, we will require, as a condition of the CPG, that AT&T file the letter prior to commencing construction of the Project.

IV. FINDINGS

1. The Project involves the installation of a new wireless telecommunications facility in Coventry, Vermont. The objective of the Project is to improve wireless telecommunications coverage in this area. The Project will also interconnect with other AT&T facilities, both existing facilities and those planned for construction in the future. Exh. JP-3-6.B.1 § III.
2. The Project is to be located at 458 Spencer Hill Road in Coventry, Vermont. Exh. JP-3-6.B.1 § I.
3. The Project involves the installation of a new monopole telecommunications tower with antennas, an equipment shelter, a generator, and associated operating equipment within a new fenced compound on property leased by AT&T. The Project also includes the construction of a new access road and a parking/turn-around area. Exh. JP-3-6.B.1 § II.
4. The facilities include a new 100-foot-tall self-supporting monopole tower with up to twelve antennas, each measuring approximately 5 feet high by 12 inches wide by 6 inches deep, mounted at a height of 97 feet on the tower. The equipment shelter will be approximately 11.5 feet by 20 feet and 10 feet high. The diesel-fueled generator will be mounted on a 4-foot by 11-foot platform within the 75-foot by 75-foot fenced compound. The Project also includes the construction of a new access road, extending 778 feet from an existing gravel road, and a parking/turn-around area, transformer and bollards to be located directly north of the compound. Exhs. JP-3-6.B.1 § II and JP-3-6.B.2.

State Telecommunications Policy

[30 V.S.A. § 248a(a)]

5. The Project is consistent with the goal of directing the benefits of improved telecommunications technology to all Vermonters pursuant to 30 V.S.A. § 202c(b). The Project will allow interconnection with the other similar AT&T facilities comprising AT&T's Vermont network, some of which have already been upgraded and others that are slated for improvements. Exh JP-3-6.B.1 § III.

**Aesthetics, Historical Sites, Air and Water Purity,
the Natural Environment, and Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

6. The Project will not have an undue adverse effect on aesthetics, historical sites, air and water purity, the natural environment, and the public health and safety. This finding is supported by findings 7 through 31 below, which are the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a) (1)-(8) and (9)(k).

Outstanding Resource Waters, Headwaters

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

7. The Project will have no impact on outstanding resource waters or headwaters. Exh. JP-3-6.B.1 § IV.

Water and Air Pollution

[10 V.S.A. § 6086(a)(1)]

8. The Project will not result in undue water or air pollution. This finding is supported by findings 9 through 11, below.

9. Dust associated with construction vehicles will be controlled at the site. Exh. JP-3-6.B.1 § IV.

10. Noise associated with construction activities will be short term, and noise from the generator will be limited in the absence of a prolonged power outage. Exh. JP-3-6.B.1 § IV.

11. The RFR associated with the Project will meet all standards prescribed by the FCC. The RFR emissions from the antenna installation is calculated to be 13% of the FCC standard for Uncontrolled/General Public MPE. Exh. JP-3-6.B.6.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

12. The Project does not involve disposal of wastes or injection of any material into ground water or wells. Exh. JP-3-6.B.1 § IV.

Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(1)(C),(a)(2) and (3)]

13. The Project will have minimal impact on water conservation measures, as the Project will not be connected to water supplies. Any water needed in connection with Project construction will be brought in from sources off of the Project site. Exh. JP-3-6.B.1 § IV.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

14. The Project is not located in a floodway. Exh. JP-3-6.B.1 § IV.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

15. The Project will not be located on, adjacent to, or near any streams or other water bodies. Exh. JP-3-6.B.1 § IV.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

16. The Project is not located on a shoreline. Exh. JP-3-6.B.1 § IV.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

17. The Project is not located near any wetlands. Exh. JP-3-6.B.1 § IV.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

18. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. All construction work will comply with Vermont standards and specifications for erosion and sediment control. Exh. JP-3-6.B.1 § IV.

Transportation System

[10 V.S.A. § 6086(a)(5)]

19. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, and other means of transportation existing or proposed. Traffic to the unmanned site will be limited following construction. Exh. JP-3-6.B.1 § IV.

Educational Services

[10 V.S.A. § 6086(a)(6)]

20. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be impacted by the Project. Exh. JP-3-6.B.1 § IV.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

21. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. The Project will not require any additional municipal or governmental services. Exh. JP-3-6.B.1 § IV.

Aesthetics, Historical Sites, and Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

22. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 23 through 30, below.

23. In order to depict the aesthetic impact of the Project on the surrounding area, AT&T has submitted photo simulations depicting views of the Project based on a balloon test that took place on September 2, 2010. Exh. JP-3-6.B.1 § IV.

24. AT&T has taken generally available steps to mitigate the aesthetic impacts associated with the Project. The Project will utilize a monopole tower design to hide the coaxial cables connecting antennas to operating equipment in the shelter, and the Project will be located in a forested area, with an average tree height of 47 feet, to provide screening for the compound, shelter and lower levels of the tower from certain vantage points. Exhs. JP-3-6.B.1 § IV and JP-3-6.B.2.

25. AT&T has evaluated alternative sites for the Project in this area and found that they result in either less robust coverage, or provide no discernable aesthetic difference compared to the proposed Project site. Exh. JP-3-6.B.1 §§ IV, VIII.

26. The Project would not be considered shocking or offensive to the average viewer. Exh. JP-3-6.B.1 § IV.

27. The Project does not violate any clearly identified community standards contained in the relevant regional or town plans. Exh. JP-3-6.B.1 §§ IV-V.

28. The Project will not have an adverse impact on known historic sites. Exhs. JP-3-6.B.1 § IV; 6.B.7.

29. The Project will not have an adverse impact on irreplaceable natural areas. Exhs. JP-3-6.B.1 § IV; 6.B.7.

30. The Project will not destroy or significantly imperil endangered species or necessary wildlife habitat. Exh. JP-3-6.B.1 § IV.

Discussion

Based on the above findings, the Board finds that this project will not have an undue adverse effect on the aesthetics or scenic and natural beauty of the area. In reaching this conclusion, the Board has relied on the Environmental Board's methodology for determination of "undue" adverse effects on aesthetics and scenic and natural beauty as outlined in the so-called Quechee Lakes decision. *Quechee Lakes Corporation*, #3W0411-EB and 3W0439-EB, dated January 13, 1986.

As required by this decision, it is first appropriate to determine if the impact of the project will be adverse. The project would have an adverse impact on the aesthetics of the area if its design is out of context or not in harmony with the area in which it is located. If it is found that the impact would be adverse, it is then necessary to determine that such an impact would be "undue." Such a finding would be required if the project violates a clear written community standard intended to preserve the aesthetics or scenic beauty of the area, if it would offend the sensibilities of the average person, or if generally available mitigating steps will not be taken to improve the harmony of the project with its surroundings. The Board's assessment of whether a particular project will have an "undue" adverse effect based on these three standards will be significantly informed by the overall societal benefits of the project.

In this case, the Project will be located in a primarily forested area and would, therefore, be considered out of context with its surroundings. However, as noted in the above findings, the Project does not violate a clear written community standard and will not offend the sensibilities of the average person. In addition, the Petitioner has taken generally available steps, including

siting the Project in a forested area, which will provide screening, and near existing access roads, which will minimize the impact of the Project on its surroundings. Therefore, we conclude that the Project will not have an undue adverse impact on the aesthetics of the surrounding area.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

31. The Project will not unnecessarily or unreasonably endanger any public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to public investments. Exh. JP-3-6.B.1 § IV.

Town and Regional Plans

[30 V.S.A. § 248a(c)(2)]

32. By facilitating the expansion of telecommunications coverage in the area, the Project is consistent with the land conservation measures contained in the Coventry Town Plan and Bennington County Regional Plan. Exh. JP-3-6.B.1 §§ V, VI.

33. Both the Town of Coventry Selectboard and the Northeastern Vermont Development Association have issued a letter recommending approval of the Project by the Board. Exh. JP-3-6.B.1 § V.

State and Local Permits

[30 V.S.A. § 248a(d)]

34. There are presently no local or Act 250 permits related to the parcel on which the Project is to be located. There is an existing wastewater permit for future residential development of the parcel; however, none of the permit conditions apply to the Project. Exh. JP-3-6.B.1 § VII.

V. CONCLUSION

Pursuant to 30 V.S.A. § 248a(a):

Notwithstanding any other provision of law, if the applicant seeks approval for the construction or installation of telecommunications facilities that are to be interconnected with other telecommunications facilities proposed or already in existence, the applicant may obtain a certificate of public good issued by the public service board under this section, which the board may grant if it finds that

the facilities will promote the general good of the state consistent with subsection 202c(b) of this title.

Further, pursuant to the Procedures Order:

Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 90 days of its filing

Based upon all of the above evidence, the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and the proposed Project will promote the general good of the State.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the installation and operation of communications facilities at the location specified in the above findings, by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall be issued in this matter.

Dated at Montpelier, Vermont, this 11th day February, 2011.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: February 11, 2011

ATTEST: s/ Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.